Before the
Federal Communications Commission
Washington DC 20054

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	
Capability to All Americans in a Reasonable	)	CC Docket No. 98-146
and Timely Fashion, and Possible Steps	)	
to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF THE AMERICAN ISP ASSOCIATION IN THE FCC's "THIRD INQUIRY"

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REPLY COMMENTS OF THE AMERICAN ISP ASSOCIATION

The American ISP Association (AISPA), hereby submits these comments in response to the Federal Communication Commission's ("Commission") August 9, 2001 Third Notice of Inquiry Concerning the Deployment of Advanced Telecommunications Capability (*"Third Inquiry")*

INTRODUCTION

The AISPA is a group of Internet Service Provider ("ISP") trade associations, independent ISPs, and others who have a common interest in advancing the ability of independent ISPs to deliver information to customers and members. AISPA's members are generally not competitive local exchange carriers but are enhanced service providers of intraLATA information services. As such, they are dependent upon interconnection with incumbent local exchange carriers ("ILEC") to the extent competition has not yet developed for ILEC's products and services.

All of America's independent ISPs have an interest in this proceeding, whether or not they are currently engaged in the business of providing high speed Internet service to their customers, which requires access to Advanced Telecommunications Capability. No ISP would prefer to limit sales to slow, "dial-up" connections rather than high-speed service, yet that is precisely the environment to which many of America's Internet

Service Providers have been confined since DSL deployment commenced in the late 1990's. Although the phone networks are presumably open for interconnection and the 1996 Telecommunications Act in fact mandates it, the interpretation of the law by the ILECs and regulators charged with enforcing the law has in effect presented the nation's ISPs with a "Hobson's choice" which is to say, no choice at all; making a mockery of the definition of an "open network".

Consequently, this has meant that the ISPs who introduced Americans to the Internet have not themselves had access to advanced telecommunications capability in a reasonable and timely fashion, as mandated by Congress, and this exclusion in turn has meant that millions of Americans are also being deprived of this same reasonableness and timeliness.

Various commenters in this proceeding have suggested prescriptions for improving the pace of deployment and some have suggested that the Commission's data-gathering process is leading to overly optimistic assessments of the current and estimated future pace of deployment. The AISPA hereby responds to various comments.

1. Comments of Intel Corporation

The most striking aspect of the comments received in this Third Inquiry lies less in the comments themselves, burdened with rhetoric and evasion of the Commission's specific questions, but the array of companies and associations presenting comments. The Commission's previous two inquiries were we recall, quite a different affair; suffused with comment not only from the nation's largest telephone companies but also from the many companies who had been attracted to the market by the opportunities promised in the context of the 1996 Telecommunications Act, as well as comments from the ISPs they served. Most of those companies are silent now, not only in this proceeding but in the marketplace itself. The meek pleading in the Commission's Second Inquiry, from Jato Communications Corp. (a high-speed Internet access company that focused on the second and third tier markets) for the smallest measure of recognition, "a task force to monitor deployment in the rural areas and implement measures to prevent independent LECs from engaging in [anti-competitive] practices"[1] went apparently unanswered, as

[1] Comments of Jato Communications Corp., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps

did the rest of Jato's reasonable suggestions. As a result, the unchecked discrimination of Jato's monopoly supplier/competitors was undoubtedly a major factor in the company's demise and subsequent absence from the Third Inquiry.

Intel's entrance into this new void of commentary is appreciated. Intel's support for deregulation of "all new, last mile broadband investment"[2] as a stimulant for rapid deployment is incomprehensible, however. In fact, this company and others who provide the hardware underlying broadband deployment should share the concern of the independent ISPs who have created today's robust competitive Internet access market. However, a belief that deregulation is the answer is not supported by the facts. Tepid enforcement of certain regulations governing existing interconnection, coupled with the premature abandonment of other regulations has led to catastrophic consequences in the Digital Subscriber Line "DSL" market. If, as we continue to read, the ILEC residential market share for DSL service remains at 90%, with their business market share in hot pursuit, a new monopoly has clearly been established.

The comprehensive Section 706 rulemaking suggested by Intel already exists in a sense, in the form of the Commission's ongoing examination of the Computer III requirements, which are directly relevant to the development of the broadband market. In its comments in this proceeding earlier this year, the AISPA reiterated and confirmed the comments of the Information Technology Association of America which "commented that the non-structural safeguards under *Computer III* have not served to deter the ILECs from discriminatory practices in the provision of DSL and other components used by ISPs to provide high speed Internet access. It contends that structural separation remains the only way to curb the anti-competitive abuses of the ILECs. While the AISPA's initial comments focused on what might be done to strengthen *Computer III*'s method of using CEI plans to minimize discrimination, the AISPA also contended that structural separation should not have been relaxed and superseded with the Commissions *Computer III* regime. The AISPA wholeheartedly agree with ITAA that structural separation is a

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to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Notice of Inquiry, CC Docket No. 98-146, FCC 00-57 (rel. February 18, 2000).

[2] Comments of Intel Corp., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry, CC Docket No. 98-146, FCC 01-223 (rel. August 10, 2001).

simpler, more effective means of achieving the objective and ideally should be reinstated."[3]

The reasons are simple. The monopoly market shares obtained so quickly by the ILECs in the DSL market suggest an undeniable inside advantage, particularly since with DSL, the loop and the Internet service are incomparably wedded. DSL consumers who successfully run the gauntlet of ILEC diversions, remaining loyal to an independent ISP, may still experience phone line trouble and then find it difficult to avoid additional contact with the supplier of the loop. ISPs who have forsaken profitability in order to acquire these DSL customers find themselves at risk of losing the customer all over again when the monopoly phone supplier inserts itself into the repair process. ISPs complain of the need for lengthy conference calls between themselves, their customers, and the ILEC's repair department to ensure that the ILEC does not steal their customer. Obviously there are two issues: 1) additional cost to the ISP and 2) unfair, predatory behavior. As we indicated previously to the Commission, "The sunset of Section 272 and the Commission's relaxed *Computer III* regulation have made it easier on the ILECs to operate an affiliated ISP, while at the same time making it more difficult for the ISPs to police their rights."[4]

Before Intel proposes the elimination of unbundling regulation, the company ought to first explain how the market has been better served by the destruction of competition unleashed by the sunset of structural separation and weak enforcement of documented regulatory violations. Intel's own competitive experience is not particularly relevant or instructive since, as William G. Shepherd explains it, "The minimum conditions for effective competition are reasonably clear, both from theory and business experience. But the lessons have frequently been distorted and confused in the literature since 1970. This post-1970 wave of theorizing – based on new-Chicago school, game theory, and contestability ideas doesn't supplant the mainstream lessons."[5]

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[3] Comments of the American ISP Association, Request for Further Comment to Update and Refresh Record on Computer III Requirements, April 16, 2001

[4] Ibid

[5] W.G. Shepherd, "Dim Prospects: effective competition in telecommunications, railroads and electricity" The Antitrust Bulletin/Spring 1997: "For a review of those schools, see W.G. Shepherd, The Economics of Industrial Organization (4th ed. 1997), especially Chapter 1. In fact, even George Stigler, the new-Chicago-school leader, argued for "the presence of numerous competitors," in his "The Organization of Industry 14 (1968).

Shepherd's observations are particularly useful in light of the monopolization of the DSL market: "Dominance and tight oligopoly are not effective competition. Dominance exists when the leading firm has over 40% of the market, with no close rival and only a few small competitors. The key defect of single-firm dominance is that competition usually lacks parity among a substantial number of rivals, so that there is an absence of strong mutual pressure. All of the firms are likely to perform poorly. The dominant firm has an easy time of it and is not pressed to perform well; it can resort to a variety of strategic and selective tactics to quell any aggressive small rivals. Those little firms on their part, face excessively high risks and pressures."[6]

In the absence of "effective competition" then, Intel appears to be advocating for unregulated ILEC monopolies – without a shred of evidence that unregulated monopolies are at all likely to deploy the new technologies upon which Intel and the ISPs depend.

2. Comments of New Networks Institute

The AISPA notes with interest Intel's contention that faster speeds attract early adopters, and that "high-bandwidth users and applications might well be the impetus that makes broadband access widespread and affordable."[7] For this reason we believe the comments by New Networks Institute regarding alternative regulations agreed to by state legislatures in return for ILEC deployment promises are relevant to the Commission's inquiry. Since these deployment promises generally far exceeded the scope of the most widely deployed and affordable technologies and the promised deployment was funded by ratepayers, it seems reasonable to ask what Americans got for their money. If two-way video services were not delivered in return for unrestricted profits on value-added features like caller ID and voicemail, it seems unlikely that a lesser version of broadband will be delivered in exchange for the unrestricted profits that flow from an unregulated monopoly.

The New Networks Institute comments also address the issue which has likely harmed the reasonable and timely deployment of DSL more than any other: that of the

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[6] W.G. Shepherd, "Dim Prospects: effective competition in telecommunications, railroads and electricity" The Antitrust Bulletin/Spring 1997

[7] Comments of Intel Corp., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry, CC Docket No. 98-146, FCC 01-223 (rel. August 10, 2001).

non-cost based tariffs filed by three of the country's four incumbent phone monopolies for DSL. These tariffs require purchase of the "last mile" loop at a price that was only pennies below the retail price for the monopolies own "bundled" offerings (which typically include the loop, the Internet access, the expanded bandwidth, and costly modems supplied to consumers free of charge). In order to disguise the tariffs as non-discriminatory, these ILECs offered discounts for volume purchases that were impossible for all but the nation's largest ISPs to achieve.

Most of the country's Internet service providers were forced to turn their customers away when they asked to convert to DSL, because of the unreasonable wholesale cost of the loop. In response to a complaint from IgLou Internet Services, in Louisville Kentucky, the Kentucky Service Public Service Commission found that Bell South's tiered pricing structure "has provided preferential and discriminatory service to itself to the detriment of other customers, specifically the small ISPs, in violation of Kentucky Revised Statutes § 278.170".[8] BellSouth, like Verizon and SBC before it, refused to revise the tariffs at the state level, but did revise them at the Commission. BellSouth's revision eliminated the volume discounts but raised the minimum price on every loop, and doubled the installation fee, completely without cost justification. This cannot possibly improve the reasonable and timely delivery of advanced services to all Americans, and the Commission should consider the regulatory tools at its disposal to rectify this situation.

New Networks Institute's observation that ILEC ISPs enjoy superior access to ILEC ordering and billing systems is also germane in the discussion about why Americans may not be receiving advanced services as quickly or as reasonably as they should, and it reiterates comments the AISPA submitted in the Computer III Inquiry. "While all ILECs make access to competitive ISPs available through loops configured to carry DSL, the means of ordering and provisioning DSL differ depending on whether DSL is provided for the ILEC-ISP's customer or for an independent ISP's customer. A number of independent ISPs report that the time period for providing DSL is faster for a customer who selects a ILEC-ISP. Sometimes the ILECs will facilitate electronic

[8] In the Matter of IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc., Case No. 99-484 (Ky. P.S.C. November 30, 2000), Order at p. 9.

ordering with web-based tools but, even in such cases the ordering process is not equivalent. Independent ISPs in SBC's area (PacBell) note that the ILEC has access to automated ordering systems (ASOS) while the independent ISPs must go through the ILEC's "ISP Support Center" resulting in delay in provisioning the independent ISPs' customers. Customers who contact a ILEC representative for DSL are immediately given an order confirmation number and an installation date because the ILEC representative has ASOS access. Customers who order DSL through an independent ISP wait at least two workdays before receiving order confirmation. The installation date is typically one week later for the ISPs' customers than the ILEC-ISPs customers… AISPA believes that until there is parity in ordering, there can be no parity in installation. It urges the Commission to consider extending CEI requirements to allow ISPs access to ILEC ordering systems for DSL and other Internet services ONA offerings."[9]

3. Comments of the Ruby Ranch Internet Cooperative Association

The Ruby Ranch Internet Cooperative Association "RRICA" comments regarding satellite-based Internet services are supported by the AISPA. It is not appropriate to weight satellite service, with its real and practically insurmountable latency problems, equally in the equation of advanced services availability, even though as RRICA notes, it is tremendously useful for those who have no other options at all.

RRICA's point about the misleading conclusions that can presently be derived from Form 447 is well taken and though ISPs are keenly sensitive to the issue of revealing competitively sensitive information, we encourage the Commission to consider improvements to the reporting process which balance those concerns with the need to lend meaning to the Commission's report and transform it into a constructive tool.

4. Comments of The Progress and Freedom Foundation

The comments of the Progress and Freedom Foundation "PFF" are essentially the Intel recipe in a different box; arguing in favor of regulatory forbearance for all broadband networks despite the fact that one of these networks exists only through the good graces of the government protection it enjoyed for more than 70 years, and has not yet been de-monopolized. Our comments in response to Intel's similar opinion suffice.

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[9] Comments of the American ISP Association, Request for Further Comment to Update and Refresh Record on Computer III Requirements, April 16, 2001

We have one additional observation, however, in response to PFF's notion that this country's broadband deployment now carries with it an extra measure of urgency and national security interest because of the recent "attacks in New York and Washington".[10] First, PFF misunderstands the nature of Internet routing when it suggests that "deployment of new broadband facilities increases redundancy because such facilities inherently increase the diversity of routing available in our communications infrastructure." As far as the Internet itself is concerned, broadband deployment has no effect whatsoever on routing.

4a. Security and Reliability of the Internet

Data centers located in places other than those which handle voice traffic tend to belong to competitive ISPs and telecom carriers; indeed ISPs were crucial to information flow in the aftermath of the tragedy, as voice networks were overloaded, but the Internet lived up to its promise. But even this is beside the point. Internet Service Providers readily agree with all commentary that reasonable and timely deployment of advanced services is an important *economic* issue.

It is not, however, a matter of national security, and the very suggestion carries with it the unmistakable scent of political opportunism. The idea that "people whose offices were located in damaged or destroyed portions of New York's financial district" could have carried on with their work if only they had had broadband connections at home is insensitive at best and disrespectful at worst, to everyone who suffered such terrible personal loss on September 11.

CONCLUSION

The Commission's obligation to ensure the timely and reasonable deployment of Advanced Telecommunications Capability to all Americans is one that cannot be satisfied by inaction, or worse; the willful abandonment of the prerogative to act. Regulatory forbearance has already been employed by the Commission in the case of

[10] Comments of The Progress and Freedom Foundation, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry, CC Docket No. 98-146, FCC 01-223 (rel. August 10, 2001).

Computer II & Computer III regulations meant to prevent the ILECs from seizing undue advantage in the advanced services market. The results of this forbearance are now clear, in the monopolization of the DSL market, and the resulting delay in deployment for consumers, and diminished competitive choice.

The Commission should not choose between the inertia of doing nothing and the pressure to do even less, but should instead re-examine proven measures of competitive markets, and enforce the laws meant to facilitate them, keeping in mind that "Deregulation is often plagued by a mistaken belief that getting a little competition is as good as achieving fully effective competition. That misunderstanding is increased because the regulators' old skills in applying static-efficient regulatory pricing rules are largely irrelevant to the antitrust criteria for the new dynamic processes involving market power and competition. Conditions that are favorable for efficiency under regulation (such perhaps as price discrimination) can quickly become harmful devices in dominant-firm situations (for example, that same price discrimination, when it is now applied against small competitors, can suppress competition)."[11]

Reasonable and timely deployment of advanced services depends upon that competition, and though it is possible at this point that the DSL monopolies illegally gained cannot be undone without antitrust action, those gains certainly should not be sheltered, or glossed over, by glowing reports of a competitive industry which in reality is facing suffocation.

Respectfully submitted

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[11] W.G. Shepherd, "Dim Prospects: effective competition in telecommunications, railroads and electricity" The Antitrust Bulletin/Spring 1997